88-253

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No.

DENZIL PRITCHARD, et ux.

Appellants

v.

BOARD OF COMMISSIONERS OF
CALVERT COUNTY, et al.

Appellees

APPENDIXES TO STATEMENT OF JURISDICTION FOR APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 114
September Term, 1987

BOARD OF COUNTY COMMISSIONERS OF CALVERT COUNTY, MARYLAND et al.

v.

DENZIL PRITCHARD, et ux.

Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,
Orth, Charles E., Jr.
retired (specially assigned),

JJ.

Opinion by Rodowsky, J.

Filed: May 9, 1988

In this case owners whose land was downzoned before they acquired any vested rights in the prior zoning classification argue that the downzoning violates procedural due process. The argument succeeded in the Court of Special Appeals but, as hereinafter explained, does not succeed here.

Respondents, Denzil and Elizabeth Pritchard (the Pritchards), own a tract of 21.569 acres in the northeast quadrant of the intersection of Maryland Route 4 and Brickhouse Road in the Third District of Calvert County (the Site). On May 8, 1984, a comprehensive rezoning of Calvert County was adopted, effective May 9,

1984, at which time new county wide zoning maps and the text of a new Calvert County Zoning Ordinance (Ord.) became legally operative. See Ord. Sections 1-2, 2-1 and 7-3. Under the 1984 rezoning the Site was classified rural commercial, a district "created to provide a zoning classification for existing commercial enterprises located outside Town Centers and Marine Commercial Districts at the time of the 1984 Comprehensive Rezoning." Ord. Section 3-1.05.[1] Commercial

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[1] Section 3-1.05 further provides in relevant part:

Additional Rural Commercial Zoning will be considered comprehensively at least every four years (Cont.)

retail uses are permitted uses in the rural commercial zone. Ord. Section 3-2.03.

On May 8, 1984, the Site was undeveloped.[2] With respect to undeveloped property zoned rural commercial on the date of adoption of the comprehensive rezoning Ord. Section 7-4.02 B provides:

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[1] (Cont.) and will be based on a comprehensive evaluation of the need for and appropriateness of additional commercial zoning outside Town Centers and Marine Commercial Districts. In order to help ensure highway traffic safety and to promote the public welfare, additional Rural Commercial Zoning shall not be approved on a parcel of land which adjoins a minor arterial or which requires direct access onto a minor arterial.

[2] On April 18, 1984, the Calvert County Planning Commission had approved a plan for a (Cont.)

Undeveloped Rural Commercial properties outside Town Centers as identified on the Zoning Maps will be allowed to retain commercial zoning for a period of two years from the adoption of this Ordinance. At that time, those properties with an approved site plan will have an additional two years to complete substantial construction of their buildings. Those properties

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[2] (Cont.) convenience food store on the property on the condition that the only access be to Brickhouse Road. The Pritchards, aggrieved by the condition, appealed to the Circuit Court and "also sought to enjoin the enactment of [the 1984] zoning ordinance because its site plan review procedure expressly authorized the denial of access to Route 4, thereby rendering the appeal moot." Pritchard v. Calvert County Planning Comm'n, Court of Special Appeals of Maryland, No. 136, September Term, 1985, filed October 15, 1985 (unreported). The Circuit Court denied the injunction and affirmed the agency. The Court of Special Appeals affirmed the circuit court. Id.

without an approved site plan shall be automatically zoned consistent with the zoning in the area after the first two year period. Those properties with approved site plans which have not completed substantial construction of their principal buildings within the additional two year period referred to above, shall be automatically zoned consistent with the zoning in the area. Only those portions of properties which can demonstrate substantial construction of their principal buildings within the additional two year period shall retain commercial zoning. Any residue shall be zoned consistent with the zoning in the area.

On August 2, 1988, a contract purchaser from the Pritchards, Compson Development Company (Compson), caused to be submitted to the Calvert County Planning Commission (the Commission) a preliminary subdivision plan which proposed a shopping center on the

site. The Commission granted preliminary approval of the plan at its regular meeting on October 16, 1985, subject to conditions. One of the conditions permitted access only to Brickhouse Road. The Commission's secretary notified Compson of the preliminary approval and of the specific conditions by letter dated November 1, 1985. There was no appeal from this action of the Commission. [3]

On May 7, 1986, when two years from the effective date of the 1984

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[3] On November 12, 1985, Compson submitted a sketch plan to the Commission reflecting access only to Brickhouse Road. The Commission, by letter to Compson dated December 20, 1985, pointed out that it was "not the Planning Commission's normal procedure to take official (Cont.)

ordinance had nearly expired, the Pritchards, acting in their own names, submitted for review plans under which the site would be utilized as a shopping center. The plans were identical to those for the shopping center previously

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[3] (Cont.) action on the Sketch Plans and no site plan ha[d] been submitted." Because of Compson's "specific request for action upon the Sketch Plan as submitted," the Commission at a meeting on December 4, 1985, disapproved the sketch plan for two reasons. First, it called for a traffic light at the intersection of Route 4 and Brickhouse Road which was not consistent with the comprehensive plan. Second, the septic field serving the shopping center was required to be located within the boundaries of the commercial zone but the sketch plan showed the septic field on adjacent, noncommercially zoned land. Thereafter Compson's involvement with the Site seems to have ended.

proposed by Compson. At a regular meeting held on May 21, 1986, the Commission unanimously disapproved those plans because the property "was rezoned from Rural Commercial to Rural on 5/8/86" so that the site plan was "not consistent with the proper zoning." [4]

The Pritchards appealed to the Circuit Court which affirmed the Commission. That court reasoned

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[4] It is immaterial in this case whether "two years from the adoption [on May 8, 1984]," expired on May 8, 1986, as the Commission stated, or on May 9, 1986, by computing time in the same manner as that prescribed in Md. Code (1957, 1985 Repl. Vol.), Art. 94, Section 2. For the sake of consistency with the Commission, we shall utilize May 8, 1986.

Further, no issue has been raised in the case now before(Cont.)

that once the two-year period under Ord. Section 7-4.02 B expired the property was no longer in a district which permitted the shopping center use proposed on the site plan.

The Pritchards appealed to the Court of Special Appeals which reversed in an unreported opinion. The court recognized that the intent of Section 7-4.02 B was to adopt a "use it or lose it" rationale but thought that the procedural steps were unclear, saying:

> The language used in Section 7-4.02 B is ambiguous in that it

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[4] (Cont.) us concerning the Commission's conclusion that a reclassification to rural was "consistent with the zoning in the area after the first two year period."

> does not specifically address or define the effect on the automatic rezoning provision of the timely submission of a site plan application; it does not answer the question whether the automatic rezoning will occur immediately upon the expiration of the period notwithstanding that prior to that time an application for site plan approval had been filed.

The court considered Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) to be a relevant precedent. That decision held that due process required a hearing on a claim under an Illinois anti-discrimination statute which provided a statutory entitlement to certain remedies. In the case at hand the Court of Special Appeals, although conceding "that no property rights exist in zoning absent vested rights," said

> that such rights may be bestowed upon a property owner in the zoning ordinance itself and, once bestowed, constitutionally may not be removed without appropriate procedural safeguards. This is precisely the situation sub judice. By virtue of Section 7-4.02 B, [the Pritchards] were given an entitlement, for a two-year grace period, in the rural-commercial zoning of their property. That entitlement could be continued and, in fact, was guaranteed upon their obtaining of an approved site plan. That entitlement may not be extinguished without adequate and appropriate safe-guards. [Citations omitted.]

The court then concluded that the entitlement could not automatically be terminated without a hearing, particularly when the Pritchards faced the "impossible" burden of being required "to speculate" when an application must be filed so as

to allow sufficient time for the Commission to act.

We granted Calvert County's petition for certiorari. [5]

I

The Pritchards present here, as they did in the intermediate

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[5] The Pritchards had also filed, on April 22, 1986, a complaint for a mandamus ordering the Commission to approve a site plan attached as Exhibit 1 to that complaint. That site plan exhibit called for access to Route 4. The circuit court entered judgment for the defendants in the mandamus action. The Pritchards appealed to the Court of Special Appeals from the denial of mandamus and that appeal was consolidated with their appeal from the Commission's disapproval of the site plan submitted on May 7, 1986. The Court of Special Appeals affirmed the circuit court's denial of mandamus and we denied the Pritchards' petition for certiorari from that affirmance.

appellate court, a ground of decision which does not require deciding whether their due process rights were violated by the Commission. They submit that, as a matter of statutory construction, one complies with Section 7-4.02 B by submitting a site plan in "approvable" form within two years from May 8, 1984, without regard to when the plan is approved. The text simply does not permit that interpretation. After providing that undeveloped rural commercial properties outside town centers "will be allowed to retain commercial zoning for a period of two years from " May 8, 1984, the ordinance reads that "[a]t that

time, those properties with an approved site plan will have an additional two years to complete substantial construction of their buildings." The phrase, "[a]t that time" refers to the time when the two years expire. A site plan which meets the condition is one which is "approved" at that time. The last day of the two-year period is the last day by which the condition must be satisfied, not the beginning of a period of site plan review during which rural commercial zoning continues.

In addition, the argument that "approvable" should be, in effect, substituted for "approved" is of no ultimate benefit to the Pritchards

unless "approvable" is taken to mean "approvable" in some form into which the site plan might evolve from the form in which it was submitted on the day before the end of the two-year period. This is because the site plan actually submitted by the Pritchards was identical to a plan previously submitted by Compson which the Commission would not unconditionally approve. It is not the purpose of the two-year provision in the ordinance to mark the beginning of a period of negotiation over the features of the project.

When Section 7-4.02 B is viewed in the light of prior Maryland downzoning cases, it is clear that

the two-year provision is a matter of legislative grace. "[I]n order to obtain a vested zoning status, there must be construction on the ground[.]" Washington Suburban Sanitary Comm'n v. TKU Assocs., 281 Md. 1, 23, 376 A.2d 505, 516 (1977). Thus, we have sustained zoning amendments which prevented or substantially altered a project when, prior to construction but in anticipation of the continuation of the prior zoning, an owner: expended $1,500,000 and dedicated $800,000 worth of land in planning a 900,340 square foot retail and office complex, id.; expended nearly $260,000 on plans for a refinery and obtained a building permit, Steuart

Petroleum Co. v. Board of County Comm'rs, 276 Md. 435, 347 A.2d 854 (1975); expended $1 million in planning an apartment development and obtained a building permit for 420 units, County Council for Montgomery Co. v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); and obtained from a board of appeals, pursuant to an adjudication by this Court, a special exception for a concrete batching plant followed by preliminary approval of a site plan, Rockville Fuel & Feed Co. v. City of Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972). See also Richmond Corp. v. Board of County Comm'rs, 254 Md. 244, 255 A.2d 398 (1969); Marathon Bldrs., Inc. v.

Montgomery County Planning Bd. of the Maryland-National Capital Park & Planning Comm'n, 246 Md. 187, 227 A.2d 755 (1967); Bogley v. Barber, 194 Md. 632, 72 A.2d 17 (1950); Mayor and City Council of Baltimore v. Shapiro, 187 Md. 623, 51 A.2d 273 (1947). Under the principle established by these cases the County Commissioners of Calvert County could have placed the Site in a rural zone, effective as of May 8, 1984, despite plans the Pritchards, or one claiming under them, might have had for a shopping center at the Site.

Instead, the County Commissioners enacted a saving clause for properties zoned rural

commercial which were undeveloped as of May 8, 1984. Owners of that class of land were given two years within which to obtain an approved site plan and an additional two years within which to complete substantial construction of their principal buildings. The legislative body concluded that two years was a reasonable period within which to prepare, submit and obtain approval of the site plan for any size project utilizing rural commercial zoning. Indeed, the validity of that legislative conclusion is demonstrated by Compson's experience in obtaining the response of the Commission within several months after

Compson's submission. Unlike the Court of Special Appeals, we do not discern an ambiguity in Section 7-4.02 B arising from its lack of express provisions dealing with the effect on the automatic reclassification of a pending but unapproved site plan as of May 8, 1986. Under the subject ordinance, the initial benefit of the saving clause is achieved only by site plan approval and the ordinance is not concerned with the effect of site plan submissions, as such.

Consequently, absent a site plan approved within two years from May 8, 1984, Section 7-4.02 B of the ordinance operated to reclassify the Site into a rural zone. The

question then becomes whether constitutional arguments advanced by the Pritchards, particularly procedural due process, prevent the ordinance from having that operation and effect.

II

A

There is no procedural due process violation. The hearing which the Court of Special Appeals considered to have been denied to the Pritchards was a hearing before the Commission on the site plan submitted May 7, 1986. Underlying that analysis is the concept that the submission stayed the automatic rezoning so that the site plan should have been considered under

the rural commercial zoning. The Court of Special Appeals seems to consider that result constitutionally required in order to cure the ordinance's vagueness as to a deadline for submission of the site plan, although that court did not articulate its reasoning in those terms.

The Supreme Court stated the guidelines governing a facial challenge on due process grounds to claimed vagueness of a statute in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). Under attack in that case was a municipal ordinance which required, under penalty of criminal

fines, licensing of, and recordkeeping by, persons selling "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs[.]" Id. at 492, 102 S. Ct. at 1190. In that context the Court said:

> The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [Id. at 498, 102 S. Ct. at 1193

(footnotes omitted).]

In the case now before us the Pritchards were on notice on May 8, 1984, that their property would be downzoned in two years absent an approved site plan. The ordinance identifies the reviewing agencies which must approve a site plan before a building permit will be issued. [6] Because the size and complexity of a specific project will affect the length of time required for agency review, prudence dictates that one who owned undeveloped rural commercial land as of May 8, 1984, would inquire of

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[6] An applicant submits a completed application form, the (Cont.)

the appropriate Calvert County officials as to how far in advance of the automatic downzoning a site plan for a

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[6] (Cont.) appropriate fee and the site plan to the Division of Inspections and Permits. Ord. Section 6-1.04 A. The Chief of Inspections and Permits refers the permit to the appropriate agencies for review. Section 6-1.04 C. Pursuant to Section 6-1.05 the following agencies review plans:

A. Division of Inspections & Permits;
B. Department of Planning & Zoning;
C. Planning Commission, which reviews for conformity with, inter alia, the zoning ordinance;
D. Engineering Division;
E. Soil Conservation Service;
F. County Health Department;
G. State Fire Marshall;
H. County Water & Sewer; Division; and
I. State Highway Administration.

specific type of project should be submitted in order to obtain approval within the two-year period. Due process does not require greater specificity as to the timing of an application than that provided in Section 7-4.02 B.

The Court of Special Appeals considered that the grace period provided by the saving clause was in some way extended by the Pritchards' last minute filing, and considered that the function of the Commission was to review the tendered site plan for conformity with rural commercial zoning. Thus, the court concluded that this case was controlled by principles involving procedural due process as applied to the

deprivation of statutory entitlements. We do not agree. Assuming that the saving clause had conferred a statutory entitlement on the Pritchards, that entitlement was lost by the terms of the ordinance two years after May 8, 1984, and was not extended by the filing on May 7, 1986. When the Commission reviewed the Pritchards' site plan at its regular meeting on May 21, 1986, the downzoning had taken effect and the Commission could not approve a site plan for a shopping center in a rural use district.

In this respect the case at hand is like Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) where a

university decided, for unstated reasons, not to renew on its expiration the one-year contract of a teacher who needed three more years to be eligible for tenure. Reversing lower court holdings that the teacher had been denied procedural due process the Court held that the teacher's "property" interest in employment at the university

> was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the [teacher's] employment was to terminate on June 30. [Id. at 578, 92 S. Ct. at 2709.]

The Court held that under those circumstances the teacher "did not

have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." Id. at 578, 92 S. Ct. at 2710.

Consequently, Logan v. Zimmerman Brush Co., supra, is not on point. The Illinois anti-discrimination statute involved in that case placed an obligation on the agency administering the statute to convene a fact-finding conference with 120 days after a charge of discrimination was made by a complainant. The agency, apparently by oversight, scheduled the hearing on Logan's complaint for a date five days after expiration of the

statutory period. 455 U.S. at 426, 102 S. Ct. at 1152. The Supreme Court of Illinois held that the failure to conduct the hearing within the statutory period terminated the claim. The United States Supreme Court found a denial of procedural due process. The Illinois statute conferred on Logan a state-created right to redress discrimination. Whether Logan would obtain redress under that statute depended upon whether he was unable to perform his duties as a shipping clerk or whether he was discriminated against because one of his legs was shorter than the other. The Court held that Logan's claim under the statute was a form of

property of which he could not be finally deprived without "'some form of hearing.'" Id. at 433, 102 S. Ct. at 1156 (quoting Board of Regents v. Roth, supra, 408 U.S. at 570-571 n.8, 92 S. Ct. at 2704-5 n.8). Applying a standard under which "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved,'" 455 U.S. at 434, 102 S. Ct. at 1157 (footnote omitted) (quoting Goss v. Lopez, 419 U.S. 565, 579, 95 S. Ct. 729, 738-39, 42 L. Ed. 2d 725, 737 (1975)), the Court concluded that the Illinois statute presented "an unjustifiably high risk that meritorious claims will be

terminated" and that "the State's interest in refusing Logan's procedural request is, on this record, insubstantial." 455 U.S. at 435, 102 S. Ct. at 1157.

Logan was concerned with a hearing at which the agency, acting in a quasi-judicial capacity, would have determined adjudicative facts.

> Professor Davis says that adjudicative facts are facts about the parties and their activities, businesses and properties. They usually answer the questions "of who did what, where, when, how, why, with what motive or intent" while legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." [Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 712, 376 A.2d 483, 497 (1977), cert. denied, 434 U.S. 1067, 98 S. Ct. 1245, 55 L. Ed 2d 769 (1978) (quoting 1 Davis,

Administrative Law Treatise Section 7.02 (1958)).]

Here, unlike the problem in Logan, the Pritchards' property was not downzoned as a result of any determination of adjudicative facts by the Commission. The downzoning was legislative action embodied in the ordinance of May 8, 1984, with the downzoning delayed for the two-year grace period. In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976), the owner of property which had been reclassified by the town council to permit a high-rise apartment lost the rezoning in a municipal referendum called for by the town charter. The owner claimed that the

referendum effected a standardless delegation of legislative power, but the Court held that the citizens of the municipality acted legislatively in exercising a power reserved by the people themselves. 426 U.S. at 672, 96 S. Ct. at 2361. The Court further stated:

> If [the owner] considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to [the owner] would be determined as a matter of state law, as well as under Fourteenth Amendment standards. That being so, nothing more is required by the Constitution. [Id. at 677, 96 S. Ct. at 2363-64 (footnote omitted).]

The only finding made by the Commission in the case before us was that the site plan proposed a

shopping center on property in a rural zone which does not permit that use. The Commission essentially reached a legal conclusion on undisputed facts. Any due process requirement for judicial review of that legal conclusion is more than satisfied by the appeal to the Circuit Court for Calvert County, followed by appeal as of right to the Court of Special Appeals, and by the discretionary review by this Court.

B

The Pritchards argue that the downzoning violates their equal protection rights. They rely, once again, on Logan v. Zimmerman Brush Co., supra, but, for the instant

argument, on the positions espoused by six justices in two concurring opinions. Those justices believed that the Illinois anti-discrimination statute created two classes of claimants, those whose claims were processed by the agency within the 120-day time limit and those whose claims were not timely processed. The six justices concluded that there was no reasonable basis for the classification because it depended wholly on a factor beyond the control of the claimant.

The County Commissioners of Calvert County in implementing the saving clause made site plan approval the criterion for

qualifying for continued rural commercial zoning and fixed two years as the period within which that qualification must be attained. Unlike Logan, whether a property owner satisfies the criterion by the time limit is a matter over which the property owner can exercise control, where, as here, there is no question as to the good faith of the administrative review. Those who submit their site plans for review early in the two-year grace period enjoy a greater likelihood that the process will be completed and any approval granted than do those who delay until late in the process or who, as did the Pritchards, delay until the last moment. "It is

evident from the circumstances of this case that approval of a site plan was impossible on May 7[, 1986]." Respondents' Brief at 16. Rewarding diligence bears a reasonable relation to the saving provision's objective of striking a balance between the economic hopes or expectations of property owners and achieving the comprehensive plan's goal of reducing commercial uses outside of town centers.

C

Finally, the Pritchards contend that the downzoning violated the State enabling Act, specifically, Md. Code (1957, 1988 Repl. Vol.), Art. 66B, Section 4.05(a). In relevant part it provides:

> Such regulations, restrictions, and boundaries may from time to time be amended, supplanted, modified, or repealed. Where the purpose and effect of the proposed amendment is to change the zoning classification, the local legislative body shall make findings of fact in each specific case . . . and may grant the amendment based upon a finding that there was a substantial change in the character of the neighborhood where the property is located or that there was a mistake in the existing zoning classification.

The automatic downzoning at the end of the grace period of undeveloped rural commercial property for which a site plan had not been approved was part of the comprehensive 1984 rezoning of Calvert County. "The so-called 'change or mistake' rule applicable to piecemeal zoning cases is not controlling in comprehensive zoning cases, and the plan is

entitled to the same presumption of correctness as an original zoning." Scull v. Coleman, 251 Md. 6, 12, 246 A.2d 223, 226 (1968). And see Montgomery County v. Woodward & Lothrop, Inc., supra, 280 Md. at 703 n.8, 376 A.2d at 493 n.8.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT FOR THE ENTRY OF A JUDGMENT AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY. COSTS TO BE PAID BY THE RESPONDENTS.

APPENDIX B

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1435
September Term, 1986

DENZIL PRITCHARD, et ux.

v.

BOARD OF COMMISSIONERS OF CALVERT COUNTY, MARYLAND, et al.

Bell, Rosalyn B.
Karwacki
Bell, Robert M.

JJ.

PER CURIAM

Filed: June 26, 1987

Denzil and Elizabeth Pritchard, the owners of land located at the intersection of Md. Route 4 and Brickhouse Road in Calvert County, entered into a contract for the sale of that land to Compson Development of Virginia, Inc. (Compson). The sale was contingent upon the purchasers obtaining site approval and building permits for development of the land as a commercial shopping center. When the contract was entered into, the land was zoned rural commercial permitting retail development of more than 5,000 square feet. It was also subject to Article 7, Section 7-4.02 B of the Calvert County Zoning Ordinance, which provides:

Undeveloped Rural Commercial properties outside Town Centers as identified on the Zoning Maps will be allowed to retain commercial zoning for a period of two years from the adoption of this Ordinance. At that time, those properties with an approved site plan will have an additional two years to complete substantial construction of their buildings. Those properties without an approved site plan shall be automatically zoned contingent [sic] consistent with the zoning in the area after the first two year period. These properties with approved site plans which have not completed substantial construction of their principal buildings within the additional two year period referred to above, shall be automatically zoned consistent with the zoning in the area. Only those portions of properties which can demonstrate substantial construction of their principal buildings within the additional two year period shall retain commercial zoning. Any residue shall be zoned consistent with the zoning in the area.

Article 6 of the Calvert County

Zoning Ordinance provides that an approved site plan may be obtained by submitting a site plan for review and approval by a number of agencies. Compson, having caused a site plan of the property and a traffic study to be prepared, applied for an approved site plan and the required submittals were made to the appropriate county agencies. Appellants were not parties to the application.

The Calvert County Planning Commission, which "[r]eviews plans for conformance with the comprehensive plan, zoning ordinance, subdivision regulations, town master plans, and design standards. . .," Section 6-1.05C,

granted preliminary approval of the plan subject to the condition that the development would not access onto Md. Route 4. Therefore a sketch plan, modified to address the Planning Commission's concern regarding the previously submitted site plan, was drafted and submitted to the Commission. The Commission considered this draft plan at a public hearing, in which appellant Denzil Pritchard participated. At the conclusion of the hearing, the Planning Commission rejected the sketch plan on two bases:

> 1. The proposed traffic light at the intersection of Maryland Route 4 and Brickhouse Road is not consistent with the Calvert County Comprehensive Plan.
>
> 2. The proposed septic

> area for the commercial use must be contained within the boundaries of the commercially zoned property.

Following receipt of the Planning Commission's decision, Compson neither submitted other plans nor appealed the decision. And even though a copy of the Commission's decision was forwarded to appellant Denzil Pritchard, appellants did not appeal either. Subsequently, four months after the Planning Commission's decision, appellants filed a complaint for mandamus in the Circuit Court for Calvert County to compel the County and its agencies to approve the Compson's site plan.

As previously indicated, the zoning on appellants' land was

subject to the provisions of Section 7-4.02B. That section was adopted on May 8, 1984. Consequently, the classification of appellants' land was to be automatically downgraded to rural on May 8, 1986 unless on or prior to that date a site plan had been approved by the Commission. To forestall this eventuality, appellants filed, in their own names, a site plan, identical to the one originally filed by Compson with the Planning Commission. This plan was considered at the next reguarly [sic] scheduled Planning Commission meeting on May 21, 1986. The Commission rejected the plan on the basis that, as of the date of the meeting, the property had been

reclassified to a rural zone and, thus, proposed a use not permitted in that zone. Appellants, who were not notified that its site plan application would be reviewed on May 21, 1986, were informed of the denial of the application and the reason for the denial, more than a week later. They appealed to the circuit court.

Appellee's answer to appellants' mandamus action asserted that mandamus was not the appropriate remedy to obtain review of the Planning Commission's decision and appellants moved to strike that defense, presenting squarely the issue whether mandamus was available. Arguments on that

issue and on appellant's administrative appeal were presented at a hearing held on September 22, 1986. The court denied appellants' motion to strike appellees' defense and, upon motion of appellees, dismissed the mandamus action. It also affirmed the decision of the Planning Commission, concluding that:

> the property not having met the condition and the expiration time having arrived, I think the Planning Commission appropriately denied the application on the grounds that the site plan applied for no longer fit the zoning of the property.

Appellants' appeal from the judgments thus entered presents two questions:

1. Whether a complaint

for mandamus is the proper remedy when the plaintiff below had no clear right of appeal.

2. Whether a site plan submitted pursuant to a zoning ordinance which guarantees a zoning designation until a specific date must be evaluated according to the zoning in effect on the day of submission.

For reasons set forth hereinafter, we will affirm the judgment as to the mandamus action, but reverse the judgment as to the administrative appeal.

1.

Mandamus is a most valuable and essential remedy in the administration of justice, but it can only be resorted to to supply the want of some more appropriate ordinary remedy. Its office, as generally used, is to compel corporation, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative,

> and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted. The application for the writ being made to the sound judicial discretion of the court, all the circumstances of the case must be considered in determining whether the writ should be allowed or not; and it will not be allowed unless the court is satisfied that it is necessary to secure the ends of justice, or to subserve some just or useful purpose.

Bovey v. Executive Director, Health Claims, 292 Md. 640, 644 (1982), quoting George's Crk. C. & I. Co. v. Co. Com., 59 Md. 255, 259 (1883). Thus, the writ of mandamus will lie where the party seeking the writ demonstrates that "a public official

has a plain duty to perform certain acts, that [the party] has a plain right to have those acts performed, and that no other adequate remedy exists by which [the party's] rights can be vindicated." (citations omitted) Prince George's County v. Carusillo, 52 Md. App. 44, 50 (1982). The writ will also lie where there is no statutory provision for review of the acts of a public official, who is alleged to have abused his discretion. Id. See Cicala v. Disability Review Board, 288 Md. 254, 259 (1980).

Appellants contend that, since they had "no clear right of appeal", mandamus is the appropriate means of obtaining judicial review of the

Planning Commission's decision. They argue that Section 6-1.05 of the Calvert County Zoning Ordinance does not provide a right of appeal since no "zoning action by the local legislative body", as required by Maryland Code Ann. art. 66B Section 4.08(a), has been taken. [1] They further assert that they are unable

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[1] Section 4.08(a) provides:

Any person or persons, jointly or severally, aggrieved by any decision of the board of appeals, or by a zoning action by the local legislative body, or any taxpayer, or any officer, department, board, bureau of the jurisdiction, may appeal the same to the Circuit Court of the county, Such appeal shall be taken according to the Maryland Rules as set forth in Chapter 1100, Subtitle B. Nothing in this subsection shall change the existing standards for review of any zoning action.

to appeal pursuant to the provisions of the Maryland Code Ann. art. 66B, Section 4.08(f) [2] because they were not parties to the application for site plan approval. Moreover, appellants deny that the possibility of intervention before the circuit court provides them with an adequate remedy.

By its express provisions, Section 4.08(f) authorizes an appeal

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[2] Section 4.08(f) provides:

In addition to the appeal provided in this section, a local legislative body may provide for appeal to the circuit court of any matter arising under the planning and zoning laws of the county or municipal corporation, but in Cecil County an appeal of a subdivision approval shall first be taken to the board of appeals. The decision of the circuit court may be appealed to the Court of Special Appeals.

procedure additional to that provided in Section 4.08(a). [3] It permits a local legislative body to allow an appeal of "any matter arising out of the planning and zoning laws of the county," not simply "zoning actions", to the circuit court. Pursuant to that authorization, the Calvert County Council enacted Section 6-1.05.C, relating to the Planning Commission's review of site plans, and provided that "Appeal may be

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[3] Urbana Civic Association, Inc. v. Urbana Mobile Village, Inc., 260 Md. 458 (1971), on which appellants rely, was decided prior to the addition of Section 4.08(f) to Art. 66B in 1975. See Ch. 414, Laws of 1979. Consequently, that case is inapposite.

made to the Circuit Court, Courthouse, Prince Frederick, Maryland - 535-1600." Patently, a clear right of appeal is provided from decisions of the Planning Commission with regard to site plan reviews. Moreover, neither the ordinance nor Section 4.08(f) restricts, in any way the right of appeal; neither provides, nor even implies, that the appeal right is limited to the parties to an application before the Planning Commission. In fact, not even Section 4-08(a) is so restrictive.

The test of the right to appeal is whether the person seeking to appeal is aggrieved by the decision of the administrative body. Section

4-08(a). A person is aggrieved if his or her

> [p]ersonal or property rights are adversely affected by the decision of the [Commission]. The decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally.

Bryniarski v. Montgomery County, 247 Md. 137, 144 (1967). See Wier v. Witney Land Company, 257 Md. 600, 610 (1970); Witney v. Major Realty, 251 Md. 63, 64 (1968); Gnau v. Seidel, 25 Md. App. 16, 25 (1975). Certainly appellants were aggrieved. As the owners of the land, the contract as to which required reclassification as a precondition

to its sale, they were affected in a way different than the public generally. Moreover, appellants had standing to appeal the adverse decision of the Planning Commission to the circuit court. Appellant Denzil Pritchard was not only present at the Planning Commission proceedings at which he made statements for the record but the fact of his ownership interest in the land under consideration was also a part of that record. "[A]bsent a reasonable agency rule or regulations providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of

the matter being considered by that agency, thereby becomes a party to the proceedings." Morris v. Howard Research and Dev. Corp., 278 Md. 417, 423 (1976). See Bryniarski, 247 Md. at 143 (testifying before the agency is sufficient to render one a party); Hertelendy v. Montgomery County, 245 Md. 554, 557 (1967) (submitting a letter of protest into evidence is sufficient); DuBay v. Crane, 240 Md. 180, 184 (1965) (identifying oneself on the record as a party to the proceeding suffices). Thus, appellant Denzil Pritchard was a party to the proceedings. That Mrs. Pritchard was not would not have prevented the court from

entertaining the appeal. See Weir, 257 Md. at 614; Bryniarski, 247 Md. at 147.

We hold, therefore, that, far from erring in dismissing appellants' mandamus action, the court was eminently correct in doing so.

2.

Appellants' appeal from the Planning Commission's decision presents a more serious and difficult issue. At its heart is the question, whether the Commission was required to evaluate appellants' site plan application, filed prior to the expiration of the two-year period, in light of the zoning in effect on the date of filing or in

light of the zoning in effect on the date on which the application was reviewed. The answer to this issue requires that we determine whether appellants had a vested right to the zoning bestowed upon its property by Section 7-4.02B. This determination, in turn, depends upon the interpretation of Section 7-4.02B to discover its true meaning and intent of the legislative body.

In seeking to ascertain the intention of the legislative body in enacting the ordinance, we look to the language of the enactment in its natural and ordinary signification and, if it is plain and unambiguous, no further. City of Baltimore v. Hackley, 300 Md. 277, 283 (1984).

If, however, the language of the enactment is ambiguous, the enactment must be interpreted so as to further the legislative body's intent, State v. Berry, 287 Md. 491, 495 (1980), and in such a way as to avoid an unreasonable result or one that is inconsistent with common sense. Frank v. Baltimore County, 284 Md. 655, 659 (1979). The ordinance quite clearly provides that certain undeveloped rural commercial property "will be allowed to retain commercial zoning for a period of two years" after its adoption and that, at the end of that two-year period, "[t]hose properties without an approved site plan shall be automatically zoned

consistent with the zoning in the area after the first two year period." This "use it or lose it" rationale, see Colwell v. Howard County, 31 Md. App. 8, 13 (1976), has the obvious purpose of permitting the owner of property in a rural commercial zone to develop that property so long as he does so in an expeditious manner. Thus, the ordinance balances appellants' right to develop their property with the right of the county to control development in the county. It has, then, "a rational relationship with the purposes of zoning regulations and is a reasonable exercise of the police power." Colwell, 31 Md. App. at 13.

Although the intent of the zoning scheme is clear, the procedural steps necessary to its accomplishment are not. The language used in Section 7-4.02B is ambiguous in that it does not specifically address or define the effect on the automatic rezoning provision of the timely submission of a site plan application; it does not answer the question whether the automatic rezoning will occur immediately upon the expiration of the period notwithstanding that prior to that time an application for site plan approval had been filed. It is this aspect of Section 7-4.02B at which appellants concentrate their attack and which

requires our interpretation. [4]

Appellants, satisfied that that portion of the ordinance allowing their property to retain rural-commercial zoning for a two-year

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[4] In this regard, it is interesting to note that a similar situation was present in Colwell. There, the ordinance provided that any amendment to the Howard County Zoning map was subject to certain conditions, including (1) submission of a site development plan within two years; (2) application for building permits within one year of site plan approval; and (3) within three years of obtaining them, completion of substantial construction pursuant to building permits. In the event of the failure to comply with either of these conditions, the property would revert to its prior classification. In Colwell, however, the ordinance called for submission, as opposed to approval of a site development plan; thus, the issue presented here was not before the Colwell Court.

period gave them a vested right in that zoning for that period, urge us to construe the two-year grace period as a kind of statute of limitations for the submission of an approvable site plan. That construction, which would require that a site plan submitted within the period be evaluated in light of the zoning existing on the date of its submission, appellants assert, would: comply with the due process of the Fourteenth Amendment; give effect to the legislative intent and to their vested interest in the zoning for the applicable period; and avoid an absurd result. To do otherwise, appellants contend, would be to render illusory the rights

accorded them by the ordinance. Appellants direct our attention to Logan v. Zimmerman Brush Company, 455 U.S. 428 (1982).

In Logan, a handicapped worker filed, within the time prescribed by the statute, an employment discrimination claim against his employer with the Illinois Fair Employment Practices Commission. The statute required the Commission to act within a specified time, 120 days, thereafter. When the Commission failed to act timely, the employer, relying upon that failure, contended that the employee's claim had been extinguished. The Supreme Court disagreed. It concluded, at the outset, that Logan's right to

file a claim under the Illinois Fair Employment Practices Act, using its adjudicatory procedures, was a kind of property right, the deprivation of which must accord with due process. 455 U.S. at 428-431. Then, acknowledging that it is permissible to require that a claim be filed within a specified time, the Court made clear that the State cannot, by reference to "a procedural limitation on the claimant's ability to assert his rights, [as distinguished from] a substantive element of the FEPA claim," 455 U.S. at 433, extinguish potentially meritorious claims without due process of law. This is so because, in the Court's words;

"[t]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." 455 U.S. at 432, quoting Vitek v. Jones, 455 U.S. 480, 490-91, n.6. The Court held that due process in Logan required a hearing to be held prior to the final deprivation of Logan's property interest. 455 U.S. at 433. In Logan, as here, the procedural limitation on which attention was focused was one over which Logan had no control and with which he could not cause compliance.

Appellees' rejoinder focuses principally upon the contention that appellants did not acquire a

property right in the zoning of its property. Their position is that: "What the ordinance gave the appellants was not a right, but an opportunity to vest a right, an opportunity they sat on until the day before it expired." They distinguish Logan on this basis as well as on two others: unlike the case sub judice, the limitation on Logan's rights was a procedural one and the State's interests there were insubstantial compared to Logan's. Thus, they say, since appellants were not deprived of a genuine property right and all proper procedures were followed in the instant case, there was neither a denial of due process nor equal

protection.

The critical inquiry is whether Section 7-4.02B had the effect of bestowing on appellants a property right in the zoning of their property. We think it did.

The zoning ordinance quite clearly allowed retention of the rural commercial zoning for a two-year period. Moreover, its continuation for an additional two years was guaranteed if, during the initial two-year period, an approved site plan were obtained. These provisions are inseparable; one must be read in light of the other and the value of the two-year grace period can be determined only by reference to the continuation

provision.

"The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause'". Logan, 455 U.S. at 430. Although we concede, as do appellants, that no property rights exist in zoning absent vested rights, see Washington Suburban Sanitary Commission v. T.K.U. Associates, 281 Md. 1, 22-23 (1977); Offutt v. Board of Zoning Appeals, 204 Md. 551, 561-62 (1954), we note that such rights may be bestowed upon a property owner in the zoning ordinance itself and, once bestowed, constitutionally may not be removed without appropriate procedural

safeguards. Logan, 455 U.S. at 432; Vitek v. Jones, 455 U.S. at 490-91, n.6. This is precisely the situation sub judice. By virtue of Section 7-4.02B, appellants were given an entitlement, for a two-year grace period, in the rural-commercial zoning of their property. That entitlement could be continued, and, in fact, was guaranteed upon their obtaining of an approved site plan. That entitlement may not be extinguished without adequate and appropriate safeguards.

Critical to both the initial entitlement to the zoning and the continuation provision is the "approved site plan", obtention of which requires action by the

Planning Commission. Section 7-4.02B. however, does not contain procedures prescribing the time in which the Commission must consider and evaluate site plan applications. It does not, for example, address when an application for site plan approval must be filed during the grace period or when, or even whether, the Commission must consider such an application.

That the subject site plan application was filed within two years is not disputed. Rather, the contention is made that the mere filing of the application is insufficient to entitle appellants to continued rural-commercial zoning; that only approval of the

site plan suffices. The failure to obtain an approved site plan within the two-year period, therefore, is, in appellees' view, dispositive. This statement of the issue renders patent the problem with the zoning scheme: While appellants may apply for site plan approval, they may not and do not control the approval process; only the Commission may act on the application. And, as we have seen, no time frame in which this must be done is provided. This being true, at some point during the two-year period - that point after which action by the Commission could not have been taken before the period expired - appellants' entitlement to the rural-commercial

zoning and its continuation was automatically terminated without a hearing. In other words, the value of appellants' rights under Section 7-4.02B, depending as they do on Commission action within the two-year period, is totally at the mercy of the Planning Commission. If the Commission chooses not to act within the period or, for some reason, is unable to act within the period, even though the application was filed, albeit late, within the period, the applicant's entitlement to continued rural-commercial zoning is irretrievably lost. More importantly, it is lost without the benefit of a hearing.

Due process, at a minimum,

requires "some' sort of hearing" (emphasis in original), Board of Regents v. Roth, 408 U.S. 564, 570-71, n.8 (1972), i.e., "an opportunity. . . granted at a meaningful time and in a meaningful manner for hearing appropriate to the nature of the case". Mullane v. Central Hanover Trust Company, 339 U.S. 306, 312-12 (1950). The opportunity ordinarily must occur before the termination of the person's property rights. No such opportunity was afforded appellants, a fact that appellees do not dispute. Moreover, interpreting Section 7-4.02B, as appellees propose, to require appellants to both timely file a site plan

application and to obtain a timely decision leads to an untenable result. Under that interpretation, appellants would be required to speculate as to when it must file the application so as to allow sufficient time for the Commission to act, or if need be, for them to force it to act. Such a burden is an impossible one.

Appellees also suggest that there is no due process violation because the procedure by which Section 7-4.02B was enacted provided appellants with abundant due process. This position is without merit. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985), the Supreme Court

pointed out that "'Property' cannot be defined by the procedures provided for its deprivation any more than life or liberty," and, further, that the answer to the question of what process is due cannot be found in the legislative enactment which is the subject of review. [5] Nor is the county's

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[5] Appellees posits [sic] that if Section 7-4.02B had provided that "rural-commercial properties will be given a two-year period to vest their rights. If unvested they will be automatically zoned consistent with the zoning in the area", appellants would not be able to raise due process or equal protection issues. We think appellees are mistaken. In that case, as in the present situation, the anomaly would still exist that appellants were required to force the appropriate authority to act if it were to realize its property rights.

interest, when considered in connection with appellants' competing interest, of a magnitude to defeat appellants' interest. Contrary to appellees' argument, the record does not reflect that there are a large number of persons in appellants' position or that to require the Planning Commission to consider the merits of appellants' site plan application would be unduly burdensome. See Logan, 455 U.S. at 435.

In conclusion, we hold that Section 7-4.02B permits the termination of appellants' property rights in the zoning of their property without a prior opportunity for a decision on the merits and,

therefore, denies appellants due process of law pursuant to the Fourteenth Amendment. Accordingly, we reverse the circuit court's judgment in the administrative appeal.

JUDGMENT IN THE MANDAMUS ACTION AFFIRMED;

JUDGMENT IN THE ADMINISTRATIVE APPEAL, REVERSED;

CASE REMANDED TO THE CIRCUIT COURT FOR CALVERT COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID ONE-HALF BY CALVERT COUNTY AND ONE-HALF BY APPELLANTS.

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

No. 114
September Term, 1987

BOARD OF COUNTY COMMISSIONERS OF CALVERT COUNTY, MARYLAND et al.

v.

DENZIL PRITCHARD, et ux.

NOTICE OF APPEAL

Denzil Pritchard and Elizabeth Pritchard by and through their attorneys, Goldstein and Sher, P.A. and Gary A. Goldstein and Charles E. Haller hereby note their appeal to the Supreme Court of the United States from the decision of the

Court of Appeals of Maryland filed May 9, 1988 in the case of Board of County Commissioners of Calvert County, et al. v. Denzil Pritchard, et ux., No. 114, September Term, 1987 pursuant to 28 U.S.C. Section 1257(2), (1970).

GOLDSTEIN AND SHER, P.A.

/s/
Gary A. Goldstein

/s/
Charles E. Haller

1709 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
(301) 727-5400

CERTIFICATE OF SERVICE

I, Gary A. Goldstein, hereby certify that as a duly admitted

member of the Bar of the Supreme Court of the United States that on this 5th day of August, 1988, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I did serve three (3) copies of this Notice of Appeal by first class mail, postage prepaid on Allen S. Handen and Mary M. Krug, Handen and Krug, P.O. Box 1130, Prince Frederick, Maryland 20678, attorneys of record for the Board of Commissioners of Calvert County and the Planning Commission of Calvert County; on William Bowen, President of the Board of Commissioners of Calvert County, Court House, Prince Frederick, Maryland 20678; and on MacArthur Jones, Chairman of the

Planning Commission of Calvert County, Court House, Prince Frederick, Maryland 20678.

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Gary A. Goldstein

IN THE CIRCUIT COURT

FOR

CALVERT COUNTY

Case No.: CA-86-286

IN THE MATTER OF THE APPLICATION OF DENZIL PRITCHARD AND ELIZABETH PRITCHARD FOR SITE PLAN APPROVAL BEFORE THE PLANNING COMMISSION OF CALVERT COUNTY SPR 86-22

NOTICE OF APPEAL

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GOLDSTEIN AND SHER, P.A.

/s/
Gary A. Goldstein

/s/
Charles E. Haller

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Planning Commission of Calvert County, Court House, Prince Frederick, Maryland 20678.

/s/

Gary A. Goldstein

CERTIFICATE OF SERVICE

I, Gary A. Goldstein, hereby certify that as a duly admitted member of the Bar of the Supreme Court of the United States that on this 11th day of August, 1988, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I did serve three (3) copies of Appendixes for Statement of Jurisdiction for Appeal by first class mail, postage prepaid on Allen S. Handen and Mary M. Krug, Handen and Krug, P.O. Box 1130, Prince Frederick, Maryland 20678, attorneys of record for the Board of Commissioners of Calvert County and the Planning Commission of Calvert County; on William Bowen, President

of the Board of Commissioners of Calvert County, Court House, Prince Frederick, Maryland 20678; and on MacArthur Jones, Chairman of the Planning Commission of Calvert County, Court House, Prince Frederick, Maryland 20678.

Gary A. Goldstein